Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-802

LAURENCE ARTHUR JANELLE,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

The Petitioner, LAURENCE ARTHUR JANELLE, respectfully prays that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Ninth Circuit entered on June 1, 1979.

OPINION BELOW

On June 1, 1979, a three-judge panel of the United States Court of Appeals for the Ninth Circuit issued an Opinion affirming the District Court's Denial of Petitioner's Motion to Suppress Evidence (Appendix "A"). The Petitioner subsequently filed a Petition for Rehearing with a suggestion for rehearing en banc. Said Petition was denied.

JURISDICTION

On June 1, 1979, the Ninth Circuit Court of Appeals entered a Judgment affirming the Order of the District Court denying Petitioner's Motion to suppress Evidence. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the provisions of the Air Transportation Security Act of 1974 subjected air freight shipments to the government's administrative scheme to strengthen the security of

air transportation, and thus whether the searches in the instant case were subject to the Fourth Amendment of the United States Constitution.

2. Whether this case should be remanded to the District Court for a factual determination as to whether or not Western Airlines did, in fact, adopt and implement security procedures with respect to cargo, pursuant to 14 C.F.R. Section 121.538(c)(3).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches, and seizures, shall not be violated ....

STATUTORY PROVISIONS INVOLVED

a) 49 U.S.C. Section 1511

> a) The Administrator shall, by regulation, require any air carrier, intrastate air carrier, or foreign air carrier, to refuse to transport --
>
> (1) any person who does not consent to a search of his person, as prescribed in section 1356(a) of this

> title, to determine whether he is unlawfully carrying a dangerous weapon, explosive, or other destructive substance, or
>
> (2) any property of any person who does not consent to a search or inspection of such property to determine whether it unlawfully contains a dangerous weapon, explosive, or other destructive substance. Subject to reasonable rules and regulations prescribed by the Administrator, any such carrier may also refuse transportation of a passenger or property when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight.

b) Section 121.538 Aircraft Security

> (a) .....
>
> (b) each certificate holder shall, before February 6, 1972, adopt and put into use a screening system, acceptable to the Administrator, that is designed to prevent or deter the carriage aboard its aircraft of any explosive or incediary device or weapon in carry-on baggage or on or about the persons of passengers, except as provided in Section 121.585. Each certificate holder shall immediately adopt and put into use its security program prescribed in paragraph (c) of this section.

(c) Each certificate holder shall prepare in writing and submit for approval by the Administrator its security program including the screening system prescribed in paragraph (b) of this section, and showing the procedures, facilities, or a combination thereof, that it uses or intends to use to support that program and that are designed to --

(1) Prevent or deter unauthorized access to its aircraft;

(2) Assure that baggage is checked in by a responsible agent or representative of the certificate holder;

(3) Prevent cargo and checked baggage from being loaded aboard its aircraft unless handled in accordance with the certificate holder's security procedures; and

(4) Assure that only persons authorized under Section 121.585 (a) are permitted to have on or about their persons or property a deadly or dangerous weapon accessible to them while aboard any of its aircraft.

c) Section 121.538 Aircraft Security.

* *

(k) Each certificate holder shall refuse to transport --

(1) Any person who does not consent to a search of his person

in accordance with the screening system prescribed by paragraph (b) of this section; and

(2) Any property of any person who does not consent to a search or inspection of that property in accordance with the screening system prescribed by paragraph (b) of this section.

d) Section 841 of Title 21, United States Code, provides in part as follows:

"... it shall be unlawful for any person knowingly or intentionally --

"to ... possess with intent to .... distribute, ... a controlled substance; ...."

Section 960 and 963 of Title 21, United States Code, provide in part as follows:

"Any person who attempts or conspires to commit any offense defined in this title ...." is guilty of an offense.

STATEMENT OF THE CASE

On October 26, 1977, Victor Moran was employed as a freight agent by Western Airlines, in Miami, Florida. On this date, an unknown male, identifying himself as Tim Spencer, presented Moran with a package which was to be

air shipped to San Diego, California. Spencer was visibly nervous, and when asked his name, appeared to think twice before responding. When asked about the contents of the package, Spencer claimed it contained photographs. The package was addressed to Laurence A. Janelle, 426 Fourth Avenue, Encinitas, California. (Clerk's Record, p. 35). [1/]

After the package was accepted by Moran, Spencer departed from the freight office. Moran then took the package to his supervisor, Terry Wood. Moran related the above information to Wood. (C.R. p. 36). Additionally, Moran told Wood that Spencer "fit the profile". (Reporter's Transcript, p. 6).[2/] This "profile" is estab-

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[1/] Clerk's Record is hereinafter referred to as "C.R.".

[2/] Reporter's Transcript is hereinafter referred to as "R.T.".

lished by Western Airlines pursuant to FAA regulations. (R.T. 10). Wood described the profile as "an unknown shipper that comes up to us and wants to ship something somewhere, and he pays cash for it, and we have never seen him before." (R.T. p. 6). This would be an individual as opposed to a commercial shipper. (R.T. p. 6).

Wood knew that a Frontier jet had been hijacked a week earlier. He also knew that a bomb threat had been made at the airport two (2) days earlier. (R.T. pp. 8, 12).

Because Wood was apprehensive that the package might contain an explosive device, he cautiously unwrapped it and discovered two clear, plastic bags containing a white powder. Wood then called the Dade County Public Safety Department. (C.R. p. 36).

The powder was found to be cocaine. The package was resealed and shipped to San Diego,

where appellant Laurence Janelle was arrested after picking up the package. (C.R. p. 37).

There was neither an arrest warrant nor a search warrant for the package in which the contraband was found. (R.T. 3).

REASONS FOR GRANTING THE WRIT

The resolution of the question of whether the Air Transportation Security Act of 1974, and subsequent legislation, subjected air freight shipments to the government's administrative scheme to strengthen the security of air transportation is one of critical constitutional importance inasmuch as it requires a definitive ruling as to the scope of the protection afforded by the Fourth Amendment of the United States Constitution to airports.

THE STATE OF THE LAW REGARDING THE FOURTH AMENDMENT AND AIRPORTS IS FRAGMENTED AND INCONSISTENT

The case of United States v. Davis, 482

F.2d 893 (9th Cir. 1973) decided that searches of airline passengers and their carry-on baggage were conducted by the airlines pursuant to federal legislation, and as a part of the general regulatory scheme to strengthen the security of air transportation. The congressional intent behind the amendments and regulations which have been passed and implemented under and subsequent to the Air transportation Security Act, and specifically 14 C.F.R. Section 121.538(c) raise valid issues as to whether or not actions of an airline taken pursuant to those regulations would create a sufficient nexus of government involvement to bring a search of air freight items within the purview of United States v. Davis, supra, and thus within the Fourth Amendment. It is submitted that the Opinion in United States v. Gumerlock and Fannon, 590 F.2d 794 (9th Cir. 1979) and the Opinion in the instant case is in conflict with the Ninth

Circuit Opinion in United States v. Davis, supra.

THIS COURT HAS NEVER DECIDED AN AIRPORT SEARCH QUESTION

United States v. Davis, supra, holds searches of passenger and carry-on luggage are subject to the strictures of the Fourth Amendment. This conclusion is based upon the extensive federal involvement in air transportation security. This decision has been followed by several other circuits.

The Opinion in Gumerlock and Fannon, supra, and in the instant case carves an exception to the Davis rule for air freight that is unwarranted by the legislative history and logic. This Opinion, by failing to follow Davis, effectively places the Ninth Circuit at odds with several other circuits.

THIS CASE SHOULD BE REMANDED FOR A FACTUAL DETERMINATION AS TO WHETHER WESTERN AIRLINES DID ADOPT AND IMPLEMENT SECURITY MEASURES PURSUANT TO 14 C.F.R. SECTION 121.538(c)(3)

In United States v. Gumerlock and Fannon,

supra, the Court of Appeals en banc concluded that Congress did not intend to require that air freight shipments be subjected to the security screening process mandated by government for passengers and their carry-on possessions. In particular the two packages involved in Gumerlock were not examined as part of a government mandated security program. 590 F.2d 794 at 796.

This conclusion was based primarily on the fact that there was nothing in the record to indicate whether United Airlines in fact adopted any security procedures with respect to cargo, or, if it did, whether the procedures include inspections approved by the administrator. United States v. Gumerlock and Fannon, supra, at 799.

By contrast, the record made in the District Court in the instant case demonstrates that the reason the package submitted by the sender was subjected to search by Western Airlines personnel

at Miami International Airport was that the sender fit the profile of a suspicious individual which was established by Western Airlines in accordance with the FAA regulations governing the shipment of goods by common carrier.

It is true that the record does not show whether or not inspections were approved by the Administrator. However, at the time of the motion to suppress evidence in the District Court, United States v. Fannon, 556 F.2d 961 (9th Cir. 1977), was the law of the Circuit and the inquiry of the District Court focused not on whether the search constituted governmental action, but whether the search was reasonable.

Therefore, it is Petitioner's contention that:

1. The requisite showing of governmental involvement in the search has been made.

2. Even if the Court concludes that it

is Petitioner's burden to show approval by the administrator of the FAA, the case should be remanded to the District Court to allow Petitioner to make such a showing.

At the time of the motion to suppress evidence, counsel had no reason to anticipate what the law of the Circuit would become in the future. Trial counsel must necessarily be directed by the law of the Circuit as it exists, and must be directed by the Inquiries of the Court.

It is submitted that in the instant case the record was developed as far as reasonably possible.

Rejection of this appeal based on failure to adequately develop the record, under these circumstances, constitutes a denial of the basic concepts of fairness and procedural due process. Fortunately, this situation can be remedied by a remand to the District Court for a rehearing.

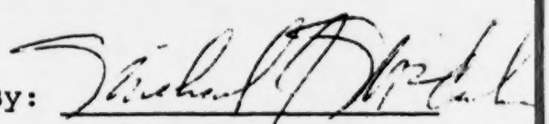
CONCLUSION

For the foregoing reasons, the Petitioner, Laurence Arthur Janelle, respectfully requests a Writ of Certiorari issue to review the judgment of the Ninth Circuit Court of Appeals.

Dated: November 14, 1979

Respectfully submitted,

SAVITZ & McCABE

By: 

Michael J. McCabe
Attorneys for
Petitioner
LAURENCE ARTHUR JANELLE

PROOF OF SERVICE

I, Michael J. McCabe, hereby declare:

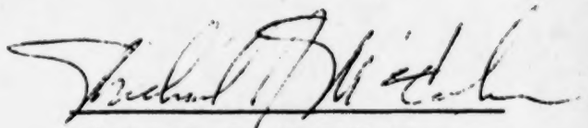
That I am a citizen of the United States of America, over the age of eighteen years, and not a party to the within action.

That my business address is 108 Ivy Street, San Diego, California.

That on November , 1979, I placed an envelope with postage prepaid, a copy of PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT to the following:

Solicitor General of the United States
Honorable Wade McCree
Department of Justice
Washington, D.C. 20430

I declare under penalty of perjury that the foregoing is true and correct. Executed on this day of November, 1979, at San Diego, California.



Michael J. McCabe

Filed: June 1, 1979

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- LAURENCE ARTHUR JANELLE, Defendant-Appellant.	)	No. 78-1837 MEMORANDUM

Appeal from the United States District Court for the Southern District of California

Before: TRASK and WALLACE, Circuit Judges, and HOFFMAN,* District Judges

Janelle appeals from his conviction for conspiracy to possess and possession of cocaine with intent to distribute, in violation of 21 U.S.C. §846 and 841(a)(1).

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* The Honorable Walter E. Hoffman, United States District Judge, Eastern District of Virginia, sitting by designation.

APPENDIX "A"

The only issue he raises pertains to whether or not an inspection of a consigned package by air freight employee constitutes government action so as to bring the search within the purview of the Fourth Amendment.

We deferred decision of this case until our court decided en banc United States v. Gumerlock and Fannon, 590 F.2d 794 (9th Cir. 1979). With the guidance of that case, we now conclude that government action was not involved and, therefore, we do not need to determine whether the warrantless search was reasonable.

Janelle contends that pursuant to 14 C.F.R. Section 121.538(c) (1976), the FAA required the carrier to promulgate a security program and a part of the resulting program was a description, known as a "profile", of a suspicious individual. Janelle contends that "since the record in the instant case clearly demonstrates that the sender of the

package in question was suspected because he 'fit the profile' of a suspicious individual promulgated as a result of the regulation," the required governmental involvement is demonstrated.

As we read United States v. Gumerlock and Fannon, we do not agree. There we stated "This provision does not require carriers to adopt any particular security procedures with respect to cargo; specifically, it does not require inspection of cargo. There is nothing in the record to indicate whether United Airlines in fact adopted any security procedures with respect to cargo, or, if it did, whether the procedures include inspections approved by the administrator." Id. at 799 (footnotes omitted). Here we have essentially the same situation. The regulation does not require inspection of cargo. There is nothing in the record to indicate that any inspection procedures were approved

by the administrator. That Western Airlines adopted a security program pursuant to a regulation is a far cry from the administrator approving inspections.

AFFIRMED.

Supreme Court, U. S.
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LAURENCE ARTHUR JANELLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported. The affirmance is noted at 601 F. 2d 604 (table).

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1979. A petition for rehearing was denied on October 12, 1979. The petition for a writ of certiorari was filed on November 12, 1979 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the inspection by an airline employee of a package deposited for shipment to petitioner violated the Fourth Amendment.

STATEMENT

Following a jury-waived trial on stipulated facts in the United States District Court for the Southern District of California, petitioner was convicted of conspiring to possess and of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 846 and 841(a)(1). Petitioner was sentenced to concurrent terms of imprisonment of one year and one day, to be followed by a special parole term of five years pursuant to 21 U.S.C. 841(b)(1)(A). The court of appeals affirmed (Pet. App. A).

The evidence adduced at the pretrial suppression hearing established that on October 27, 1977, an individual identifying himself as Tim Spencer presented a package to a Western Airlines freight agent in Miami, Florida, for delivery via a flight later that day to petitioner in San Diego, California (Tr. 5, 13).[1] Spencer appeared nervous and, when asked his name, hesitated as if he had to think about it for a second or two before responding. The agent accepted the package, and Spencer left the air freight office (Tr. 5, 8). Spencer's behavior aroused the suspicions of the freight agent, who took the package to his supervisor, Terry Wood, and stated that Spencer fit the "profile" of a bomber (Tr. 6).[2]

[1]"Tr." refers to the reporter's transcript.

[2]Ninety-seven percent of Western's shipping business is derived from commercial shippers. Spencer was an unknown individual shipper who appeared nervous, hesitated when asked his name, and paid cash for the shipment (Tr. 6-7). According to a "profile"

Wood searched the telephone directory to determine whether the return address of the shipper was listed, but he could not find a listing (Tr. 8-9). In addition, Wood knew that a Frontier aircraft had been hijacked a week earlier and that Western airlines had received a bomb threat within the previous two days (Tr. 7-8). He decided to open the package because he feared it might contain a bomb or "something that could be damaging to the airplane" (Tr. 9, 12). Upon discovering two clear plastic bags containing white powder in the package, Wood contacted the local police, who determined that the substance was cocaine (C.T. 36).[3] The package was resealed and shipped to Western Airlines' San Diego Air Freight office (C.T. 36). Petitioner was arrested when he picked up the package (C.T. 36-37).

ARGUMENT

As petitioner apparently concedes, the Fourth Amendment applies only to governmental searches and seizures, not to a search by a private party who voluntarily turns over the evidence he has discovered to government agents. See, *e.g.*, *Burdeau* v. *McDowell*, 256 U.S. 465, 475-476 (1921); *United States* v. *Lamar*, 545 F. 2d 488, 490 (5th Cir.), cert. denied, 430 U.S. 959 (1977); *United States* v. *Crabtree*, 545 F. 2d 884, 885-886 (4th Cir. 1976); *United States* v. *Sherwin*, 539 F. 2d 1, 5-7 (9th Cir. 1976) (en banc); *United States* v. *Capra*, 501 F. 2d 267, 272-273 n.4 (2d Cir. 1974). The record clearly establishes that the airline's search of the package was

developed by Western Airlines, such "walk-on" freight brought by persons exhibiting Spencer's suspicious behavior is more likely to contain an explosive device than freight from commerical sources (Tr. 7, 10).

[3]"C.T." refers to the clerk's transcript of the record on appeal.

not undertaken to serve a law enforcement purpose and was neither based upon information received from law enforcement personnel nor done at their behest. Instead, the airline undertook the search on its own initiative to protect the safety of its passengers because of a well founded concern that the package may have contained an explosive device. The search was thus a private search that did not implicate the Fourth Amendment. See *United States* v. *Ford*, 525 F. 2d 1308, 1311-1312 (10th Cir. 1975); *United States* v. *Pryba*, 502 F. 2d 391 397-401 (D.C. Cir. 1974), cert. denied, 419 U.S. 1127 (1975); *United States* v. *DeBerry*, 487 F. 2d 448, 449-451 (2d Cir. 1973).[4]

Petitioner contends (Pet. 9-10), however, that the package was inspected pursuant to security regulations promulgated by the Federal Aviation Administration, that the government therefore participated in a significant manner in the inspection, and that the inspection accordingly must comply with Fourth Amendment requirements.

The FAA regulation on which petitioner relies is 14 C.F.R. 121.538(c),[5] which requires certain airlines to submit for approval by the FAA a security program that

[4]Suppression of the fruits of a private search, especially in the context of air freight suspected to contain explosives, would not advance the deterrent purposes of the exclusionary rule, since there is little likelihood that an airline would forego immediate inspection of possibly dangerous cargo because of a fear that a potential criminal prosecution would not go forward. See generally *United States* v. *Janis*, 428 U.S. 433, 456, n.31 (1976).

[5]Petitioner also appears to rely (see Pet. 9-10) on 49 U.S.C. 1511, which requires carriers to refuse passage to persons who do not consent to a search to determine if they are carrying dangerous weapons. But, as the court concluded in *United States* v. *Gumerlock*, 590 F. 2d 794, 797-799 (9th Cir.) (en banc), cert. denied, No. 78-6300 (May 14, 1979), nothing in the legislative history of the statute or in the FAA's subsequent regulations suggests that the statute was meant to require the screening of air freight.

shows the procedures and facilities that the airline intends to use to support that program. The airline's procedures must meet certain requirements, including being "designed to * * * [p]revent cargo and checked baggage from being loaded aboard its aircraft unless handled in accordance with the certificate holder's security procedures." 14 C.F.R. 121.538(c)(3).[6]

Petitioner did not establish at the suppression hearing that Western Airlines has an FAA-approved security program setting forth procedures for inspection of air freight (Pet. App. 3-4).[7] He nonetheless argues that if such a program exists, the inspection was a governmental search that must meet Fourth Amendment standards. This Court need not consider that highly speculative question.[8] In any event, even assuming *arguendo* that there is such an approved program, petitioner's claim that his Fourth Amendment rights were violated by the search involved here is without merit.

[6]This regulation was promulgated pursuant to the FAA's general authority to prescribe safety regulations for aviation (see 37 Fed. Reg. 4904-4905 (1972)) and not, as petitioner suggests (Pet. 9-10), under the anti-hijacking provisions later enacted as the Air Transportation Security Act of 1974, 49 U.S.C. 1356 *et seq.*

[7]Although revealing details of any security program would have seriously jeopardized important safety interests, petitioner presumably could have established, through *in camera* inspection of Western's security procedures, whether the airline had an approved security program and whether that program required inspection of the parcel in this case. Petitioner showed only that the Western Airlines "profile" was established in accordance with FAA regulations (Tr. 10, 11). He did not establish that the FAA had approved a program for the inspection of air freight.

[8]Nor is petitioner now entitled to the remand he seeks (Pet. 11-14) to permit the district court to determine whether Western Airlines has an approved cargo security program. Cf. *Rakas* v. *Illinois*, 439 U.S. 128, 130-131 n.1 (1978).

Relying on its en banc decision in *United States* v. *Gumerlock*, 590 F. 2d 794, 799 (9th Cir. 1979), cert. denied, No. 78-6300 (May 14, 1979), the court of appeals correctly held (Pet. App. 3) that 14 C.F.R. 121.538 (c) "does not require carriers to adopt any particular security procedures with respect to cargo; specifically, it does not require inspection of cargo." The regulation merely leaves to the airline the choice of security procedures, and requires the carrier to comply with whatever procedures it selects. Thus, if Western Airlines' security procedure for cargo did require these inspections, that requirement was not the result of any federal direction.[9] Agency approval of a security plan is not itself enough to render subsequent inspections by airline employees, made pursuant to the plan, subject to the Fourth Amendment. Cf. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974) (approval of tariff by state utility commission where tariff was not ordered by state commission was not state action for purposes of Fourteenth Amendment).[10]

---

[9]Since the screening procedures for boarding passengers and carry-on luggage are required by agency directives authorized by 49 U.S.C. 1356, petitioner's claim (Pet. 10-11) that this case is inconsistent with *United States* v. *Davis*, 482 F. 2d 893, 896-904 (9th Cir. 1973), is without merit. In any event, any intracircuit conflict does not require resolution by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

[10]Because petitioner's limited contention is that the Fourth Amendment is applicable here only by virtue of federal regulations relating to airport security measures, it is not necessary to defer disposition of this petition pending this Court's decision in *Walter* v. *United States*, No. 79-67, and *Sanders* v. *United States*, cert. granted, No. 79-148 (Oct. 15, 1979). *Walter* and *Sanders* presented the entirely different question whether the Fourth Amendment requires suppression of allegedly obscene materials consensually transferred to the government by a private party to whom the materials had been inadvertently misdelivered.

Finally, even if the search were subject to the Fourth Amendment, the result in this case would be no different. The evidence obtained by the inspection would still be admissible because petitioner had no legitimate expectation of privacy in the air cargo. See *Katz* v. *United States*, 389 U.S. 347, 351 (1967). Under applicable tariffs, all air freight shipments are subject to inspection by the carrier. See *United States* v. *Gumerlock*, *supra*, 590 F. 2d at 799 n.17. Moreover, the common law recognizes a carrier's right to inspect the articles it is carrying, if suspicion about their contents is aroused. See *United States* v. *Rodriguez*, 596 F. 2d 169, 173 (6th Cir. 1979); *United States* v. *Pryba*, *supra*, 502 F. 2d at 399. In light of this established history, any expectation that petitioner might have had that the package would not be inspected simply ignored the realities of air cargo practices.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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PHILIP B. HEYMANN
Assistant Attorney General

FRANK J. MARINE
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FEBRUARY 1980

DOJ-1980-02